STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2004-023
RICHMOND-SAN RAFAEL BRIDGE/BENICIA-MARTINEZ BRIDGE/
SAN FRANCISCO-OAKLAND BAY BRIDGE

AND

PUBLIC WORKS CASE NO. 2003-046
WEST MISSION BAY DRIVE BRIDGE RETROFIT PROJECT,
CITY OF SAN DIEGO

I. INTRODUCTION

The general issues presented for decision in this appeal are:

(1) The scope of public works coverage of material hauling by towboat operators specific to several California bridge projects; and,

(2) The authority of the Director of the Department of Industrial Relations ("DIR") to determine the effective date of his January 23, 2006, determination ("Determination") concerning public works coverage of material hauling by towboat operators on the bridge projects.

This Decision on Appeal ("Decision") affirms the Determination as to both of these issues. Only arguments not addressed in the Determination are discussed herein.

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II. RELEVANT FACTS AND PROCEDURAL HISTORY

The lengthy factual statement in the Determination is incorporated herein by reference and supplemented with the following procedural history pertaining to this appeal.

On January 23, 2006, the Acting Director ("Director") of DIR, John M. Rea, issued the Determination, which held that on-haul towboat work on six Bay Area bridge projects bid by the California Department of Transportation ("CalTrans") and on the West Mission Bay Drive Bridge Retrofit Project bid by the City of San Diego ("City") is public work under the following circumstances:

(1) When the materials hauled by the towboat operators are from a facility dedicated to the public works project; and/or,

(2) When the towboat operators engage in the immediate incorporation of the hauled material into the public works project.

The Director also held that the Determination would have only prospective effect because at the time that each of the projects was bid, there was neither a coverage determination finding the towboat work to be public work nor a published prevailing wage rate for the towboat work.

Pursuant to California Code of Regulations, title 8 ("8 CCR § 16002.5"), section 16002.5, on February 22, 2006,

interested party Association of Engineering Construction Employers ("AECE") filed an administrative appeal of the Director's Determination and supplemented that appeal on May 17, 2006.[1] On March 3, 2006, and March 17, 2006, interested parties Engineering and Utility Contractors Association ("EUCA") and California Dump Truck Owners Association ("CDTOA"), respectively, filed additional administrative appeals. On March 3, 2006, interested party Teamsters Heavy Highway and Construction Committee for Northern California ("Teamsters") filed a notice stating that it would oppose the administrative appeals and filed such opposition on April 17, 2006, with a supplemental filing on May 19, 2006. The Construction Materials Association of California ("CMAC") and the Bay Counties Dump Truck Association ("BCDTA") filed responses in support of AECE's appeal on April 14, 2006. Lemore Transportation, Inc., dba Royal Trucking, filed an appeal April 17, 2006, with a supplemental filing on May 17, 2006. CalTrans and the International Organization of Masters, Mates and Pilots, Pacific Maritime Region ("MM&P") also filed appeals on April 17, 2006. The State Building and Construction Trades Council of California and the Joint Council of Teamsters, Local No. 42 and Local No. 87 filed responses on

[1]Each of the participants in this administrative appeal is considered an "interested party" as defined by 8 CCR section 16000.

April 24, 2006. Finally, the Associated General Contractors of California ("AGC") filed an appeal April 25, 2006.

The overwhelming bulk of these appeals concern the public works coverage holding in the Determination. MM&P challenges the Director's prospective application of the Determination.[2]

III. DISCUSSION

A. PUBLIC WORKS COVERAGE OF TOWBOAT HAULING.

1. Towboat Hauling Is Public Work When The Materials Are Hauled To The Public Works Site From An Adjacent Dedicated Site And/Or When The Haulers Incorporate The Materials Into The Public Works Site.

The gravamen of the appeals involves disagreement with the Director's interpretation of sections 1771, 1772, 1774 and the *O.G. Sansone v. Dept. of Transportation* (1976) 55 Cal.App.3d 434 ("*Sansone*")[3] decision, upon which the Determination is based, as well as the applicability of the federal Davis Bacon Act ("DBA"), regulations and decisions pertaining to public works coverage of hauling.

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[2]On February 22, 2006, MM&P filed a Petition for Writ of Mandate in Alameda County Superior Court challenging the Director's prospective application of the Determination under Labor Code section 1773.6 and in this administrative appeal, MM&P also challenges the prospective application of the coverage portion of the Determination. DIR, AECE and CalTrans filed responses. By agreement of the parties, and with the approval of the court, that action was stayed pending completion of this administrative appeal. DIR represented that it would address the issues raised by MM&P's Petition.

[3]*Sansone* is the only published California opinion applying the CPWL to hauling work performed in connection with a public works project.

On one side of the dispute is the argument urging the Director to read *Sansone* as requiring that prevailing wages be paid for all hauling of materials onto a public works site and without regard to the hauler's activity on the site. For the reasons already set forth in detail in the Determination, the position that the California Prevailing Wage Law ("CPWL") and *Sansone* require the payment of prevailing wages for any hauling work onto a public works project is rejected. As the Determination makes clear, *Sansone* stands for the proposition that prevailing wages are to be paid for hauling to a public works site based on the individual worker's "function" (whether the hauling is from a dedicated site or the hauler is involved in the immediate incorporation into the site of the materials hauled) and not based on "status" (by whom the hauler is employed).

On the other side of the dispute are the arguments that the Director should interpret the *Sansone* opinion narrowly and conclude there is no requirement to pay prevailing wages for immediate incorporation work performed by haulers on the site of a public work. The Director is urged to adopt the standards claimed to be derived from the current federal interpretation of the DBA, which are claimed to limit the application of the CPWL only to

haulers transporting material from a dedicated facility or site set up to serve the public works project exclusively, or nearly exclusively. Subject to certain questions, the parties agree that *Sansone*, DBA requirements (29 CFR § 5.2(j)(1)(iv)),[4] and past DIR public works coverage determinations require the payment of prevailing wages to workers hauling materials between a site dedicated to the primary public works site and the primary public works site.

There are two principal issues posed. The first is whether "immediate incorporators" are entitled to prevailing wages and what "immediate incorporation" means in this context. The second issue is whether the dedicated site must be adjacent to the primary public works site and, if so, what "adjacent" means for purposes of the CPWL.

With regard to the entitlement of "immediate incorporators" to prevailing wages, several parties argue that *Sansone* does not require the payment of prevailing wages to truckers who deliver materials to a public works site and then engage in their immediate incorporation into a public works project. They argue that the basis in *Sansone* referenced in the Director's holding is mere dicta

[4] 29 CFR § 5.2(j)(1)(iv)) states: "Transportation between the site of the work within the meaning of paragraph (1)(i) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (1)(2) of this section ... ."

because the two haulers, Wright and Heck, did no immediate incorporation themselves; therefore, the court's discussion of *Green v. Johes* (1964) 23 Wis.2d 551, 128 N.W.2d 1 ("*Green*") and its statements regarding immediate incorporation in *Sansone* are unnecessary to the holding in *Sansone* and should not be followed.

This position, however, ignores the facts that *Sansone* said it was addressing. The plaintiffs in the case, O.G. Sansone Company and Robert E. Fulton Company, were joint venturers who subcontracted thirty-three percent (33%) of "pay item 18" to L.D. Folsom, Inc. This portion of pay item 18 required the "incorporation" of 126,000 cubic yards of class 3 aggregate into the project by "loading, placing and compacting of the material." Two other subcontractors, Wright and Heck, were hired to perform forty-one percent (41%) of the subcontracted work, which included hauling only. *Sansone* looked to *Green*, and incorporated it into the CPWL (as it did the federal case, *H.B. Zachry Company v. United States* (1965) 344 F.2d 352("*Zachry*")) because it was necessary to explain that not only were Wright and Heck subject to prevailing wage requirements, but so were Folsom's workers who loaded at the dedicated borrow pit and placed and compacted the material onto the road bed at the public works site. The excavation, loading, hauling,

placement and compaction work was part of the integrated flow of construction on the public works project. What the *Sansone* Court thought was relevant to the facts before it is determinative. It held relevant to its determination the following extensive description, which suggests that it did not think it was making a passing reference to facts not before it:

> The Wisconsin court decided that Jones' employees were covered because under the facts of that case the materials hauled were dumped or spread directly on the roadbed and were immediately used in the construction of the project. Thus, the court stated (128 N.W.2d at p. 7): "In the instant case, although the drivers hauled materials from both commercial and 'ad hoc' pits, such materials were immediately distributed over the surface of the roadway. The drivers' tasks were functionally related to the process of construction. The crushed base for the first layer of the highway above the ground was dumped or spread by the drivers and immediately leveled by graders under the supervision of the general contractor. The crushed base and granulated sub base for shoulder material was dumped on the highway and immediately pushed onto the shoulder and leveled by the general contractor's graders. The aggregate, utilized as filler in the concrete, was dumped adjacent to a ready-mix concrete set up. The aggregate was immediately mixed with cement, and the concrete was then immediately laid upon the highway strip. Clearly, the materials were applied to the process of highway improvement, almost immediately after the drivers arrived at the site. The delivery of materials was an integrated aspect of the 'flow' process of construction. The materials were 'distributed over the surface of the roadway' with no 'rehandling' out of the flow of construction. The drivers were 'executing such highway improvement' and hence performing 'work under the contract.'"

Thus, the Director's holding that requires payment of prevailing wages to towboat operators who incorporate into the public works site materials they haul to the site is squarely supported by the holding in *Sansone* that deems such work to be within the process of construction, rather than what the court, quoting the federal case, *Zachry*, referred to, as "the delivery of standard materials to the site, a function that is performed independently of the contract construction activities." (*Id.* at 442.)

An analysis whether "immediate incorporation" has been performed by haulers will generally be determined in the context of prevailing wage enforcement, either by the DIR's Division of Labor Standards Enforcement ("DLSE") or by a valid Labor Compliance Program ("LCP").[5] That determination would be guided by the application of the relevant precedents to the particular facts of a case. Some general parameters of "immediate incorporation" have been set forth in prior DIR precedential determinations, including PW 1999-037, *Alameda Corridor Project, A&A Ready Mix Concrete and Robertson's Ready Mix Concrete* (April 10, 2000) ("*Alameda Corridor*") and PW 2000-075, *CalTrans I-5,*

[5]Here, were prevailing wages enforceable under the Determination, CalTrans, the applicable LCP, would review any complaints filed with it by the towboat workers on the bridge projects to determine whether their work falls within the parameters of the Director's coverage holdings and, if so, the amount of prevailing wages due them by the contractors who employed them.

Redmond's Concrete and Materials (August 15, 2001) ("*Redmond's Concrete*").[6]

In *Alameda Corridor*, material haulers employed by material suppliers transported ready-mix concrete to the project site and placed more than ninety-nine percent (99%) of the concrete into pumps; less than one-percent (1%) was placed directly by the hauler into forms on the site. The Director found that the haulers were not entitled to prevailing wages because their primary function was the delivery to the public works site of a product that was re-handled by on-site employees. That they participated in the placement of less than one-percent (1%) of the concrete into the project did not cause them to be considered an integrated aspect of and functionally related to the construction work on the project. In *Redmond's Concrete* driver of the Zim Mixer, a self-contained concrete mix truck which prepares rapid hardening concrete on-site, hauled concrete from a general use cement plant onto the public works highway site. The drivers also worked on the site with a contractor's employees to place the concrete directly onto the highway while other workers spread and level it.[7] As the Zim Mixer ran out of material the truckers

[6]Available at http://www.dir.ca.gov/DLSR/PrecedentialAlpha.htm.

[7]This is similar to the work of the truckers in *Sansone*, who spread aggregate the highway in that case.

drove to an on-site staging area where contractor employees reloaded the truck with material. Unlike in *Alameda Corridor*, the Director found that because the material hauled by Redmond's drivers was immediately incorporated into the project with no rehandling out of the flow of construction the drivers were performing an integral part of the construction and therefore the hauler is entitled to prevailing wages for the period in that distinct capacity performing on-site work.

These authorities indicate that immediate incorporation by the hauler is clearly covered work for the time on-site. On the other hand, the mere delivery to a public works of material that is rehandled or incorporated by other on-site workers, or the haulers' incidental placement on the public works site of the materials hauled is not covered work. The on-site incorporation work must therefore be direct, immediate, or virtually so, more than de minimis, and involve construction related activity.[8] In other words, when the hauler leaves the pure hauling role and participates in the on-site construction activity of incorporation of the material hauled, the worker is entitled to prevailing wages.

[8]References to DLSE's "on-haul" policy can be found in a number of older determinations. To the extent those determinations interpret *Sansone* to mean that material delivery alone (whether by a material supplier or contractor's employee) is sufficient to create prevailing wage obligations, they are no longer to be considered valid.

In response to the appeals that propose the adoption of the DBA standards for on-hauling, while 29 CFR 5.2(j)(2)[9] does not require prevailing wages be paid transportation of material to or from a public works site by contractor employees, DBA does appear to enforce prevailing wage obligations for the time spent on site by truckers who engage in mere delivery of materials to a public works site so long as the time spent on site is more than de minimis. This decision declines to adopt that standard[10] and as concerns on-site work, requires prevailing wages only when haulers engage in, on-site, the incorporation of the materials they haul.[11]

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[9]29 CFR 5.2(j)(2) states in relevant part: "[T]he transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not 'construction, prosecution, completion, or repair.'"

[10]At least one party has urged that the Director read the CPWL to be the same or similar to the DBA. This position is rejected because it would require the Director to ignore binding California judicial precedent.

[11]As noted by the United States Department of Labor ("DOL"):

> Giving the Act a literal reading, as the courts have done in Midway, Ball, and Cavett, all laborers and mechanics, including material delivery truck drivers, are entitled to prevailing wages for any time spent "directly upon the site of the work ... ." However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, the Department chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than "de minimis pursuant to this policy, the Department does not assert coverage for material delivery truck drivers who

Another issue raised on appeal is whether, in order for there to be public works coverage, the second, dedicated site must be adjacent to the site of the public works and, if so, what is the definition of "adjacent" under the CPWL. Neither of these questions was squarely addressed in the Determination. Several parties suggest that the Director follow the standard that the dedicated site be considered adjacent, as they interpret *Sansone* and 29 CFR 5.2(l)(2) to require.[12] These parties reason that if a dedicated site is not adjacent, or virtually adjacent, to the public works site, there should be no prevailing wage obligation because the distance between the two sites vitiates any claim that the two sites constitute a single project. The parties point out that in *Sansone*, the Court repeatedly emphasized the fact that the borrow pits were adjacent to the construction project and that adjacency is a requirement under the DBA.

Sansone supports the proposition that the dedicated site must be adjacent to the public works construction site for hauling of materials from the dedicated site to be

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come onto the site of the work for only a few minutes at a time merely to drop off construction materials … ." (65 Federal Register ("Fed Reg") 80276 (December 20, 2000)).

[12]29 CFR 5.2 (l)(2) states in relevant part: "[J]ob headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work."

deemed part of the construction. A strict definition of the term, "adjacent," which provides a specific distance limitation is, however, impractical and inadvisable on the record that the parties chose to present in their various appeals, and the unique aspects of marine hauling.

This issue was presented to the DOL when it revised its regulations regarding the hauling of material to a public works site.[13] DOL ultimately determined that setting a specific distance for determining prevailing wage obligations for hauling from a dedicated site without regard to the facts of each case would be arbitrary and might encourage contractors to move the dedicated site just beyond that distance to avoid prevailing wage obligations. As discussed in 65 Fed Reg 80268 et seq., (December 20, 2000) (at pp. 80271 to 80873), public works projects vary greatly from long, ribbon-like highways to vast construction projects such as dams.

We similarly decline to define "adjacent" as a specific distance in the context of these projects, especially without further information concerning how and what sites or facilities are used during the construction process and their distances from the respective bridge

[13]These revisions were necessary after earlier DOL regulations that covered off-site hauling were overturned in *Building and Construction Trades Dept., AFL-CIO v. United States Dept. of Labor Wage Appeals Bd. ("Midway Excavators")* 932 F.2d 985, 989-92 (D.C.Cir.1991).

projects. As noted by DOL, "a practical analysis" as performed by the Administrative Review Board ("ARB") within the DOL should govern each case. In *Bechtel Contractors Corporation, Rogers Construction Company, Ball, Ball, and Brosamer, Inc., and the Tanner Companies (Bechtel II)*, ARB Case No. 97-149 (98 WL 168939) (March 25, 1998), the ARB found that batch plants situated within one-half mile of pumping stations that were part of the Central Arizona Project, a 330 mile-long aqueduct and series pumping stations, were "virtually adjacent," even though drivers would travel up to 15 miles along the aqueduct to deliver concrete to where it was incorporated into the project. ARB reasoned that there was no "principled basis" to exclude the workers because aerial photographs clearly showed that the batch plants were virtually adjacent to the aqueduct.

In sum, in determining the adjacency of a dedicated site, the best approach is to analyze the facts of each case and apply a practical common-sense approach to the question of proximity based on the nature of the particular project. Here again, were prevailing wages enforceable on the bridge projects the fact that the bridge projects take place over expansive bodies of water would certainly have to be considered in determining adjacency of any dedicated site.

2. Labor Code Section 1720.3[14] Does Not Prohibit Coverage Of On-Site Hauling Work.

Section 1720.3 states:

> [F]or the limited purposes of Article 2 (commencing with section 1770), "public works" ***also*** means the hauling ***of refuse from*** a public works site to an outside disposal location, with respect to contracts involving any state agency, including, the California State University and the University of California, or any political subdivision of the state.

Several parties to the appeal argue that the only hauling work covered by the CPWL is that done under the conditions set forth in section 1720.3. Under the theory that expression of something in a statute necessarily means the exclusion of things not expressed, the parties contend that the Legislature in enacting section 1720.3 did not intend any other hauling work to be covered by the CPWL. As highlighted above, the statute says public works "also" means hauling "from" a public works site. Several parties argue that despite the word "also," section 1720.3 is the "only" statute applicable to hauling. The statute also references hauling "refuse" "from" a public work site. For the reasons below, and starting with the literal meaning of "also,"[15] it is difficult to credit this position after

[14]Unless otherwise indicated, all subsequent section references are to the California Labor Code.

[15]"Also" is defined as "in addition, likewise, or too." (Webster's New World Dict. (3d College Ed. (1991) p. 40.)

examining the doctrine, the legislative history, and the timing of section 1720.3's enactment relative to *Sansone*.

First, the bill that became section 1720.3 was enrolled on August 31, 1976, and was signed by then Governor Brown on September 20, 1976. This was several months after the seminal case on public works coverage of hauling, *Sansone*, was decided on February 19, 1976.

The Legislature is presumed to be aware of judicial precedent when enacting new legislation. *People v. Overstreet* (1986) 42 Cal.3d 891, 897. It can therefore be presumed that the Legislature's failure to overturn the public works coverage of the on-hauling in *Sansone*, not only when it enacted section 1720.3 in 1976 (well after *Sansone* was decided), but also in subsequent amendments to section 1720.3 in 1983 and 1999, indicates that the Legislature did not intend the conditions contained in section 1720.3 be the exclusive circumstances under which hauling constitutes public work.

Several parties also contend that the failure of legislative amendments in 1999 that would have included certain on-haul activity in section 1720.3 (AB 302) indicates a legislative intent not to cover such work. An unpassed legislative proposal, however, is not a useful indicator of legislative intent (*Grupe Development Company*

v. Superior Court (1993) 4 Cal.4th 911.) In addition, even if unpassed legislation reflected legislative intent, the failed amendment would have modified section 1720, not section 1720.3, to add a new subsection requiring the payment of prevailing wages for the "hauling of sand, gravel, crushed rock, concrete mix, asphalt, or other similar materials for the use or incorporation in a public works project." The failed amendment did not specifically, as here, deal with haulers who immediately incorporate material they haul but rather all haulers of material to a public works site even if the material is incorporated into the site by others.

Finally, it cannot be presumed that section 1720.3, excludes from public works coverage all other types of hauling because this section involves only off-hauling from a public works site to an outside disposal location with respect to contracts with the state or its political subdivisions. The work at issue here is on-hauling from any location to a public works site.

In sum, when section 1720.3 says another form of hauling is "also" a public work that does not mean that the Legislature meant it set forth the only circumstances under which hauling work is public work.

3. The *City Of Long Beach* Does Not Preclude A Finding Of Public Works Coverage For Hauling.

Some of the parties contend that the decision in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 ("*Long Beach*"), requires the Director to interpret section 1720(a)(1) as excluding all hauling work. They argue that the California Supreme Court found in that case that section 1720 applies only to construction work, and that just as DIR could not extend coverage of the CPWL to pre-construction activity, the Director cannot now cover hauling as construction under section 1720.[16]

The Determination and this Decision on Appeal follow *Sansone*, which finds that when haulers step out of the role of delivering standard materials, into either of the "functions" that were the subject of *Sansone*, they are entitled to prevailing wages. *Sansone* treated the sections it cited, 1771, 1772 and 1774, as defining what was covered as "public work" referenced in those sections. That was not an expansion of the CPWL by the *Sansone* Court, it is not by the Director in this matter, and it is not a retroactive application of a later statute.

Appellants misapply the holding in *Long Beach*, which simply holds that expenditures of public funds for pre-

[16]Section 1720 defines "public works," in relevant part, as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds."

construction activities did not make the Long Beach project a public work because the controlling version of section 1720(a) does not enumerate pre-construction activity as a type of public work. Thus, *Long Beach* turned on the retroactive application of section 1720, a statute not at issue here. In that case, the California Supreme Court did not address or strike down the Director's authority, and duty, to follow existing precedent (here, *Sansone*) defining which types of work are covered[17] and thus, "in execution" of "a contract for public work" under sections 1771, 1772 and 1774.

4. A Director Decision On Appeal That Addresses Both Marine And Land-Based Hauling Under The CPWL Is Not An Underground Regulation Or Otherwise Improper.

Several parties contend that a decision by the Director in response to the public works hauling issues raised in this appeal would be improper on two bases. Both concern the fact that while the Determination involves marine on-hauling, many of the appeals pertain to land-based hauling.

The first basis alleged is that the Director cannot entertain arguments not raised or addressed in the Determination. This claim, however, misapprehends the nature of the Director's mandate in a quasi-legislative

[17] 8 CCR § 16001(a).

proceeding concerning public works coverage. Unlike administrative adjudications, this quasi-legislative process allows the Director to consider the views of any interested parties, not just those that were a party to the Determination. Here, although the facts of this Determination involve marine hauling, reliance on *Sansone* (a land-based hauling decision also referenced in the Director's earlier Point Loma determination is necessary as this Determination certainly impacts land-based hauling.[18] As such, the issues raised on appeal regarding land-based trucking, which are relevant to the coverage of the Determination and, therefore, may be considered by the Decision. Further, to the extent this basis implies any party may not have had the opportunity to submit its views, in fact, all parties have been given more than ample time to submit responses to all the arguments raised by all interested parties in the appeal process.

The second basis argues that addressing what is inaccurately perceived as trucking issues on appeal is a violation of the Administrative Procedure Act ("APA") because the Director would allegedly be engaged in rulemaking.

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[18]In PW 97-011, *Towboat Operators, Point Loma Reballasting Outfall Project, South Bay Ocean Outfall Contract No. 3, City of San Diego* (January 23, 1998) ("Point Loma").

The Director's coverage determinations are case specific, addressed to specific persons, and, when designated precedential, serve as guidance for cases that may have similar facts. As discussed in section B, subsection 4, the Director is authorized to issue public works coverage determinations in order to effectuate the purposes of the CPWL. Public works coverage determinations are quasi-legislative administrative opinions that interpret statutes the Director is responsible for enforcing. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11). The Director's coverage determinations are case-by-case resolutions, not regulations (*Tidewater Western Marine, Inc. v. Bradshaw* (1996) 14 Cal.4th. 557, 568-572, ("*Tidewater*")).

As has already been explained, the principles set forth in both the Determination and this Decision are common to both marine and land-based hauling. The Determination and Decision interpret the CPWL in the context of specific cases and are addressed to specific parties. Designated precedential, the Determination acts as guidance to the regulated public for those cases with similar facts and are binding on the Director, the Labor Commissioner, and CalTrans (as an LCP under 8 CCR section

16434)[19] as precedent. In this case, involving six bridge projects CalTrans, as an LCP, has a special claim to have a decision issue addressing its concerns so that it may properly undertake its enforcement responsibilities.

In this case, *Sansone* is the only applicable California decision concerning on-hauling and therefore must guide the Director's interpretation of the CPWL concerning on-hauling either in the water or on land.[20] As such, his application of *Sansone* to towboat hauling is appropriate and reasonably and necessarily extends to land-based hauling, which accounts for the participation of several parties on appeal concerned with land-based trucking issues. Thus, the Director's reliance on *Sansone* to decide issues involving marine transportation is appropriate under the facts of this case.

B. THE EFFECTIVE DATE OF THE DETERMINATION.

MM&P challenges the prospective effect given the Determination on several bases. It contends that the Director has no authority to determine the liability of contractors for the payment of prevailing wages. MM&P

[19]8 CCR section 16434 states: "[a] LCP shall have a duty to the Director to enforce the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code and these regulations in accordance with the Precedential prevailing wage decisions issued by the Director and in a manner consistent with the practice of the Labor Commissioner."

[20]For this reason, the Director declines to follow out-of-state authorities regarding on-haul to a public works site, as urged by a party to this appeal.

asserts alternatively that, even if the Director does have such authority, the towboat operators on the projects have a statutory right to payment of prevailing wages under sections 1771 and 1774. MM&P also appears to assert that CalTrans's alleged violation of a statutory duty as an awarding body to obtain the prevailing wage rate from the Director per sections 1771 and 1773 mandates a finding that the towboat operators are entitled to prevailing wages. Finally, MM&P argues that the Director's position that there is no prevailing wage liability because there were no prevailing wage rates in effect when the projects were bid is an underground regulation in violation of the APA.

1. The Director's Broad Authority To Determine The Scope And Application Of The California Prevailing Wage Law Includes The Authority To Determine The Effective Date Of Public Works Coverage Determinations.

"The Director's statutory authority is broad ... ." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 988-989.) The Director has quasi-legislative authority to establish the prevailing wage for any craft, classification or type of worker (8 CCR § 16303) and with respect to the review of prevailing wage determinations, the "Director reserves the right to make all final determinations." (8 CCR § 16300(b).) The Director also has the authority to issue public works coverage determinations "to determine

coverage under the prevailing wage laws regarding either a specific project or type of work to be performed … ." (8 CCR § 16001(a).) In addition, the Director has broad quasi-legislative authority to "carry out and effectuate all purposes vested by law in the Department …" and has "… plenary authority to promulgate rules to enforce the Labor Code … ." "Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied." (*Lusardi* at 988-989.) Finally, the Director "has authority to enforce the prevailing wage laws by regulations or administrative actions consistent with the statutory purpose." (*International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.App.4th 1632, 1638.)

In disagreeing with the Director's decision to apply prospectively the public works coverage holdings of the Determination, MM&P contends that the Director has the authority to determine only public works coverage of a project or type of work and to issue prevailing wage rates, not to determine the liability of a contractor for underpayment of prevailing wages.[21]

[21]MM&P's allegation circumvents the issue on appeal which is whether the application of section 1773.6 to the facts of this case permits retroactive enforcement of prevailing wage entitlement for towboat work in the absence of an available rate of pay prior to the publishing of the notice to bidders.

As the courts have made clear, the Director is vested with broad plenary authority to make administrative decisions not only concerning the CPWL, but concerning all aspects of the Department's mission. Not only is there no statute or decisional law prohibiting the Director from making decisions regarding the effective date of coverage determinations, but, as the courts have recognized, the Director has implied authority to act administratively concerning all aspects of the CPWL. When the Director, under 8 CCR section 16001(a)(1), determines public works coverage under the prevailing wage laws, in this case of a type of work, the liability (or non-liability) of a contractor for underpayment of prevailing wages necessarily follows from the exercise of the Director's authority in issuing a determination.

In *Lusardi*, the court specifically rejected the argument that the Director's coverage determinations impermissibly intrude on judicial powers. The court recognized that administrative agencies are authorized to hold hearings and order relief when it is reasonably necessary to effectuate the agency's legitimate regulatory purposes even if the "'essential' judicial power" remains in the courts to review agency determinations. (*Lusardi* at 993.) As such, the Director has the authority to interpret

and apply at the administrative level all aspects of the CPWL in accordance with its overall purposes, subject to court review. MM&P, however, appears to misinterpret *Lusardi* to mean that because a court has the ultimate power to review a Director's administrative determination, it follows that the court has the *sole* power to determine a contractor's prevailing wage liability.[22]

In sum, MM&P's claim that the Director has no authority to determine contractor liability for prevailing wages is incompatible with the broad authority delegated him. In addition, although the Director has the authority to adjudicate prevailing wage liability, here the Director did not do so. Rather, for the reasons set forth in the Determination, he made the coverage holding prospective, the effect of which in this case is that prevailing wages will be due towboat operators who in the future perform the covered work described in the Determination. They are not, however, required in relation to the contracts now in place

[22]In addition to the Director's quasi-legislative authority to determine the retroactivity of a public works coverage determination, effective July 1, 2001, the Legislature adopted section 1742, which gave the Director further specific authority to adjudicate prevailing wages, if any, owed to individual workers by contractors in the context of wage and penalty assessment hearings regarding public works projects. Here, MM&P's contention that although there is judicial review of other functions of the director, including the functions of determining rates of pay and coverage under the prevailing wage laws, this type of determination is reserved solely for the courts is not supported by the holding in *Lusardi*.

for these particular bridge projects that are the subject of the appeals.

2. Under Section 1773.6, Changes In Prevailing Wage Rates Of Pay Cannot Be Applied Retroactively To Any Contract For Which The Notice To Bidders Has Been Published.

MM&P's alternative argument that, independent of the Director's authority, towboat operators have a statutory right to prevailing wages ignores the due process rules established by the court for contractors in *Metropolitan Water District v. Whitsett* (1932) 215 Cal. 400 and codified by section 1773.6.

On projects in which awarding bodies directly enter into contracts for public works projects, the date on which the awarding body advertises for bids determines the controlling law for purposes of public works coverage. (8 CCR § 16000.)

MM&P does not challenge the factual assertions that the bid advertisement dates for the CalTrans projects span from April 1998, through December 2001, and that the San Diego project was advertised for bid on or about August 15, 2002. It was not, however, until August 22, 2002, that DIR first made available and published new rates in its General Prevailing Wage Determinations for the classifications

affecting towboat operators.[23] These rates were effective September 1, 2002, pursuant to 8 CCR section 16204(a). Here, all notices to bidders for the bridge projects were published prior to September 1, 2002, the date when the new prevailing wage rates for towboat workers were made available and published by DIR. Thus, all notices to bidders for the bridge projects were published prior to September 1, 2002.

Under section 1773.6,

> [i]f during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

These rules exist so that awarding bodies and competing bidders can estimate labor costs and enjoy pre-bid certainty. (*Metropolitan Water District v. Whitsett* (1932) 215 Cal. 400.) Therefore, except for contracts involving dredging, the first contract to which the rates for towboat operators were effective would be contracts where the notice to bidders was published after September 1, 2002. Here, MM&P's argument that towboat operators are

[23]Prior to August 22, 2002, the published General Prevailing Wage Determinations only contained prevailing wage rates for dredging. None of the parties here contend that the towboat work at issue on any of the bridge projects involved dredging.

entitled to payment of prevailing wages based on rates that were published and first became effective in September 2002, fails because section 1773.6 precludes retroactive enforcement of new or modified prevailing wage rates after the notice to bidders has been published.

In addition, no interested party, including the towboat operators' union representative(s), petitioned the Director concerning rates for towboat operators. Pursuant to 8 CCR section 16302, any interested party under section 1773.4 is permitted to petition the Director to review a wage determination. As indicated previously, the union is an interested party under section 1773.4 that could have petitioned the Director concerning the towboat operator rate.

MM&P also contends that the March 28, 2002, letter by former Acting Director Chuck Cake operates retroactively as a rate of pay and coverage determination for the bridge projects. MM&P's contention fails as Cake's March 28, 2002, letter purportedly setting forth prevailing rates of pay for towboat workers, cannot be retroactively enforced. The Cake letter did not issue pursuant to the law authorizing the Director to issue public works coverage determinations. Nor do Department files show that any of the required procedures set forth in 8 CCR section 16001 (request) or 8

CCR section 16002.6 (appeal) for requesting a coverage determination were followed. In addition, Cake's March 28, 2002, letter is not effective as a rate of pay determination for any of the bridge projects at issue herein, including the San Diego project, because it was never made available to the awarding body prior to the date the notice to bidders was published on or about August 15, 2002, as required by section 1773.6. Furthermore, Cake's letter was also not effective as a special determination under 8 CCR section 16202 as it was requested by a union representative and sent to a union representative. There is no evidence in the record that Cake's March 2002 letter was ever requested by or served on any awarding body prior to the date the notice to bidders was published for any of the bridge projects.

In addition to sections 1771 and 1774, MM&P relies on three cases, all of which are distinguishable, to support its position that judicial precedent precludes the Director from issuing a determination that results in no prevailing wage liability for the towboat work at issue. In *DLSE v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 121, *Waters v. DLSE* (1987) 192 Cal.App.3d 635 and *Lusardi*, previously cited herein, *some* prevailing wage rates existed for the work at issue at the time the notice

to bidders was published by the awarding body. Here, there were no prevailing wage rates available from DIR for the towboat work described herein at the time the notice to bidders was published. The holdings in *Lusardi*, *Waters* and *DLSE* confirm that a contractor or subcontractor will not be excused from paying a prevailing wage when the incorrect rate of pay is published in the notice to bidders or when no rate is published in the notice to bidders, as long as a general prevailing rate of pay exists for the work at the time the bid is advertised. Changes to prevailing rates of wages, however, *cannot* be enforced retroactively as to any contract for which the notice to bidders has been published per section 1773.6. In arguing for retroactive enforcement of a prevailing wage rate first published in September 2002 for towboat workers, it appears that MM&P is confusing the Director's public works "type of work" or "specific project" coverage determinations under 8 CCR section 16001(a)(1), which may be retroactively enforced on entire public works projects, with changes in prevailing rates of per diem wages, which may not be retroactively enforced.

Furthermore, *DLSE* v. *Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 121 is factually distinguishable. In *DLSE*, the court found that the contractor was not excused from paying the prevailing rate

as a matter of law "since the contractor agreed to pay the prevailing wage and was notified of the schedule specifying the wage rates." (*Ericsson, supra,* at 126.) Furthermore, "the contractor was aware of its obligation to pay the prevailing wage before the work was commenced." (*Ericsson* at 127.) Here, there is no evidence that the contractor or CalTrans was notified of any applicable wage rates nor was there an express contractual obligation to pay prevailing wages in the contract governing the towboat work. Therefore, the Director's finding that towboat operators are not entitled to prevailing wages on the projects at issue here because there were no prevailing wage rates in effect in advance of the dates any of the projects were advertised for bid is consistent with section 1773.6 and judicial precedent.

3. CalTrans' Compliance With A Statutory Duty As An Awarding Body Does Not Affect The Result Of This Determination.

MM&P appears to claim that CalTrans' alleged violation of a statutory duty as an awarding body to obtain general prevailing wage rates under section 1773 requires the payment of prevailing wages to the towboat operators on the bridge projects that are the subject of the Determination. Not only does CalTrans appear not to have breached a statutory duty, but its compliance does not change the

consequence of the Director's decision to apply the Determination prospectively.

a. CalTrans Complied With Its Duty As An Awarding Body.

Section 1773 requires an awarding body to obtain the prevailing wage rates for all work to be performed on the public works project. Presumably pursuant to this statutory section, on December 10, 1997, CalTrans submitted a letter to DIR's Division of Labor Statistics and Research ("DLSR") requesting a rate of pay determination for towboat operators. On March 13, 1998, DLSR responded that it did not appear that prevailing wages would be required for the towboat work as the work did not meet the public works coverage guidelines set forth in the *Point Loma* Decision. As a result, DLSR did not provide prevailing wage rates to CalTrans. CalTrans' request in its December 10, 1997, letter for rates of pay from DIR satisfied its duty as an awarding body under section 1773.[24]

[24]CalTrans has continuously maintained that the work performed by the towboat operators on the bridge projects at issue herein is not subject to the CPWL. CalTrans contends that the towboat operator work neither involves on-site construction activity nor hauling from an adjacent dedicated facility. Under its view, prevailing wages would not be required to be paid to towboat operators under either the *Point Loma* decision or the Determination challenged in this appeal. Thus, CalTrans contends that the statutory duties of an awarding body are inapplicable here as the actual work performed by the towboat operators on the bridge projects is not covered by the CPWL. The record does not contain facts sufficient to evaluate this claim.

b. CalTrans' Failure to Comply With A Statutory Awarding Body Duty Does Not Alter The Result As There Is No Evidence Of A Negative Economic Impact On The Towboat Operators.

MM&P has not articulated what, if any, consequences stem from CalTrans' alleged violation of a statutory obligation as an awarding body to obtain a general prevailing rate for towboat work that CalTrans maintains was not public work. Without using the term, MM&P appears to argue that CalTrans is *estopped* from denying that the towboat work is covered by the CPWL. Even if the towboat work at issue here is covered by the CPWL, MM&P submitted no evidence of a negative economic impact that has resulted from CalTrans' failure to obtain a rate of pay for towboat operators on the bridge projects. Presumably, towboat operators were paid the union wage for work performed on the bridge projects. There is no evidence in the record that a prevailing wage rate, higher than the towboat operators' union wage rate, would have applied had CalTrans petitioned the Director to conduct a survey in 1997 to obtain the general prevailing rate of pay for towboat operator work prior to the date the notice to bidders was published on the projects at issue herein. Such a hypothetical survey would have occurred in 1997. There is

no evidence that the new rates in DIR's General Prevailing Wage Determinations for the classifications affecting towboat operators, first made available and published by DIR on August 22, 2002 (effective September 1, 2002), would have prevailed as the general prevailing rate of pay in 1997.

In addition, per section 1773.6, a change in prevailing wage rates operates prospectively. Here, the change was from *no* prevailing wage rate to the Operating Engineers' rate of pay first published on August 22, 2002, after the notice to bidders had been published. Therefore, as there was no available prevailing wage rate prior to the bid advertisement dates for the bridge projects, there would be no contractor liability for payment of prevailing wages to towboat operators on the projects at issue. Furthermore, there does not appear to be any right to indemnification against the awarding body here.[25]

Lastly, even if CalTrans' letter to DLSR did not satisfy its statutory duties as an awarding body, the union that represents towboat operators had an affirmative duty

[25]To the extent that MM&P is arguing for indemnification of prevailing wages from CalTrans, per the later enacted section 1781, CalTrans is not an awarding body for purposes of seeking indemnification for failure to classify a project as a public work. Furthermore, prior to the enactment of section 1781 and at the time the notice to bidders was published for the towboat work at issue here, the holding in *Lusardi* required an affirmative representation by the awarding body to prospective bidders that a project or type of work is not public work. Here, the record shows no such representation by CalTrans.

of its own under 8 CCR section 16200(a)(1)(A) to provide its collective bargaining agreements to DIR prior to the bid advertisement date of the bridge projects. Here, there is no evidence that the union ever filed their collective bargaining agreement with the Department for review for publication in the General Prevailing Wage Determinations prior to the dates any of the projects at issue were advertised for bid. As such, the union is equally responsible for the lack of an available rate of pay for towboat operator work.

In sum, MM&P is incorrect that CalTrans' alleged failure to comply with a statutory obligation as an awarding body, if any, mandates a finding by the Director that towboat workers are due prevailing wages on the projects herein. In the absence of available prevailing wage rates at the time the notice to bidders is published, retroactive enforcement of prevailing wages is impermissible under section 1773.6. Indemnification of prevailing wages from the awarding body also does not appear to be an available remedy here. Thus, CalTrans' compliance or non-compliance with a statutory duty as an awarding body does not change the result of this Decision.

4. The Determination Is Not An Underground Regulation.

MM&P argues that the Director's position that there is no prevailing wage liability here because there were no prevailing wage rates in effect when the projects were bid is an underground regulation in violation of the APA. The above analysis of the APA in Section A, subsection 4 of this Decision is hereby incorporated by reference.

In addition, MM&P is incorrect that this portion of the determination is an underground regulation because the Director has merely applied the Labor Code to the specific facts of this case. Here, pursuant to section 1773.6, the Director made the coverage holding prospective, the effect of which in this case is that prevailing wages will be due towboat operators who in the future perform the covered work described in the Determination. Therefore, the application of the plain meaning of section 1773.6 to the facts of this case is not rulemaking.[26]

[26]MM&P has taken contradictory positions in this appeal by arguing that it is an underground regulation for the Director to announce the rule that in order to enforce prevailing wage requirements, there must be prevailing wage rates available in advance of the notice to bidders and that it is not an underground regulation for the Director to find that certain types of towboat operator work are public work. Here, in *both* sections of the Determination, the director applies the specific facts of this case to the regulatory and statutory authority governing the CPWL. Thus, neither section of the determination violates the APA.

Furthermore, even if coverage determinations are considered regulations, Government Code section 11340.9, subdivision (i) exempts from rulemaking "[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." Here, the Director determined that the West Mission Bay Drive Bridge Retrofit Project and the Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge Projects were not subject to the prevailing wage requirements of the Labor Code. This specific, fact-based decision was addressed to requesting parties CalTrans and City of San Diego, respectively.

MM&P also relies on *Rea (Milbauer) v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, in support of its position that the *Towboats Determination* constitutes an underground regulation. *Milbauer* is inapposite because in *Milbauer*, the "WCAB … stated throughout the decision that the new procedures were being adopted and announced to implement the WCAB's interpretation of section 3716, subdivisions (b) and (d) and *Yant* in future cases." (*Milbauer, supra*, at 647.) Here, the Director is not announcing new procedures and the factual peculiarities of the *Towboats Determination* do not support such an inference. In sum, the Director's application of section

1773.6 to a fact-specific situation is not rulemaking, and is within the Director's authority.

IV. CONCLUSION

For the above reasons, the Determination is affirmed.

Date: 31 July 06

John M. Rea, Acting Director